

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

SG EQUIPMENT FINANCE USA CORP.,

Plaintiff,

v.

KIMBALL ELECTRONICS, INC.,

Defendant.

Case No. 3:19-cv-210

COMPLAINT

Plaintiff SG Equipment Finance USA Corp., by and through its undersigned counsel, brings this action against defendant Kimball Electronics, Inc., and as and for its complaint alleges as follows:

NATURE OF ACTION

This is a simple collection action to recover money damages for defendant's breach of an agreement for the provision of cloud services by failing to pay scheduled payments due thereunder to plaintiff, as the assignee of those payments. The defendant's obligations to make those payments to plaintiff are governed under the agreement's "hell or high water" provision and, therefore, the defendant's failure to make those payments indisputably entitles plaintiff, pursuant to the express terms and conditions contained in the agreement, to the full relief requested herein.

PARTIES

1. SG Equipment Finance USA Corp. ("SGEF") is a Delaware corporation with a principal place of business located at 480 Washington Boulevard, Jersey City, New Jersey 07310, and is authorized to do business in the State of Indiana.

2. Kimball Electronics, Inc. (“KEI”) is an Indiana corporation with a principal place of business located at 1205 Kimball Boulevard, Jasper, Indiana 47546.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. 1332(a)(1) in that there is diversity of citizenship between plaintiff and defendant and this is a civil action wherein the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

8. Venue is proper in this Court pursuant to 28 U.S.C. 1391(a) because the defendant resides in this judicial district.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

EPA #1

5. On or about December 1, 2017, non-party Ariba, Inc. (“SAP”) and KEI entered into Order Form for SAP Cloud Services SAP Reference No. 0220757350 (the “Order Form”) for the provision of certain cloud services by SAP to KEI. A true and correct copy of the Order Form is attached hereto as Exhibit A and incorporated herein by reference.

6. KEI’s payment obligations for the cloud services provided in the Order Form is set forth in the Extended Payment Addendum (“EPA #1”), dated on or about December 5, 2017, to the Order Form for the provision of additional cloud services. A true and correct copy of EPA #1 is attached hereto as Exhibit B and incorporated herein by reference.

7. EPA #1 sets forth a schedule of the amounts due from KEI to SAP under the Order Form, which includes payments due on December 28, 2018 and December 28, 2019, in the amount of \$819,292.00 and \$768,292.00, respectively.

8. EPA #1 also expressly incorporates the SAP Extended Payment and Supplemental Terms and Conditions (“EP Supplement”), a true and correct copy of which is attached hereto as Exhibit C and incorporated herein by reference.

EPA #2

9. On or about December 9, 2017, the Order Form was amended by SAP and KEI pursuant to an Amendment to SAP Cloud Service Order Form SAP Reference No. 0220793167 (the “Amendment”), a true and correct copy of which is attached hereto as Exhibit D and incorporated herein by reference.

10. KEI’s payment obligations for the cloud services provided in the Amendment is set forth in the Extended Payment Addendum (“EPA #2” and, together with EPA #1, the “EPAs”) to the Amendment. A true and correct copy of EPA #2 is attached hereto as Exhibit E and incorporated herein by reference.

11. EPA #2 sets forth a schedule of the amounts due from KEI to SAP under the Amendment, which includes payments due on December 28, 2018 and December 28, 2019, each in the amount of \$85,000.00.

12. Like EPA #1, EPA #2 expressly incorporates the EP Supplement.

Assignment of Payments to SGEF

13. In addition to setting forth in clear and unambiguous terms KEI’s obligations under the Order Form, the EP Supplement also provides that SAP may assign any or all of its rights to receive payments due under the EPAs without the consent of or notice to KEI.

14. With respect to any such an assignment, SAP agreed that it will not assign, delegate, transfer or convey to the assignee any obligation to perform any of SAP’s duties or obligations under the Order Form.

15. In that regard, KEI also agreed in the EP Supplement, among other things, that:

- (i) any such assignee shall have no liability to KEI under the Order Form or otherwise with respect to any software, services, support, and consulting provided by SAP in connection with the Order Form (the “SAP Products”);
- (ii) KEI “shall have no, and waives any and all, rights to assert, pursue or otherwise make any claim, defense, counterclaim, setoff, or other cause of action” against the assignee for any loss or damage under the Order Form “or with respect to any SAP Products or for breach of any warranty, express or implied, as to any matter whatsoever, including but not limited to any SAP Products and service performance, functionality, features, merchantability or fitness for a particular purpose, or any indirect, incidental, special, or consequential damages or loss of business, loss of data or loss of profits”;
- (iii) KEI “shall timely pay all Extended Payments and other amounts payable to Assignee under each EPA, and not in any way at any time assert against Assignee any claim, defense, counterclaim, setoff, or other cause of action that [KEI] may have against SAP”; and
- (iv) KEI “shall solely assert or otherwise pursue against SAP any claim, defense, counterclaim, setoff, or other cause of action under the [EPAs] or with respect to any SAP Products.”

16. By written Assignment, dated December 6, 2017, SAP sold, assigned and transferred to SGEF, among other things, all of SAP’s right, title and interest to the payment of

\$819,292.00 from KEI due on December 28, 2018 under EPA #1. A true and correct copy of the Assignment, dated December 6, 2017, redacted to protect confidential information, is attached hereto as Exhibit F and incorporated herein by reference.

17. By letter dated January 10, 2018, SAP notified KEI of SAP's assignment to SGEF of its right, title and interest in and to the \$819,292.00 payment due on December 28, 2018 from KEI under EPA #1. A true and correct copy of SAP's January 10, 2018 letter to KEI is attached hereto as Exhibit G and incorporated herein by reference.

18. By written Assignment, dated December 19, 2017, SAP sold, assigned and transferred to SGEF, among other things, all of SAP's right, title and interest to the payment of \$85,000.00 from KEI due on December 28, 2018 under EPA #2. A true and correct copy of the Assignment, dated December 6, 2017, redacted to protect confidential information, is attached hereto as Exhibit H and incorporated herein by reference.

19. By letter dated January 10, 2018, SAP notified KEI of SAP's assignment to SGEF of its right, title and interest in and to the \$85,000.00 payment due on December 28, 2018 from KEI under EPA #2. A true and correct copy of SAP's January 10, 2018 letter to KEI is attached hereto as Exhibit I and incorporated herein by reference.

20. By written Assignment, dated December 11, 2018, SAP sold, assigned and transferred to SGEF, among other things, all of SAP's right, title and interest to the payment of \$85,000.00 from KEI due on December 28, 2019 under EPA #2. A true and correct copy of the Assignment, dated December 11, 2018, redacted to protect confidential information, is attached hereto as Exhibit J and incorporated herein by reference.

21. By letter dated December 11, 2018, SAP notified KEI of SAP's assignment to SGEF of its right, title and interest in and to the \$85,000.00 payment due on December 28, 2019

from KEI under EPA #2. A true and correct copy of SAP's December 11, 2018 letter to KEI is attached hereto as Exhibit K and incorporated herein by reference.

22. By written Assignment, dated December 28, 2018, SAP sold, assigned and transferred to SGEF, among other things, all of SAP's right, title and interest to the payment of \$768,292.00 from KEI due on December 28, 2019 under EPA #1. A true and correct copy of the Assignment, dated December 28, 2018, redacted to protect confidential information, is attached hereto as Exhibit L and incorporated herein by reference.

23. By letter dated December 28, 2018, SAP notified KEI of SAP's assignment to SGEF of its right, title and interest in and to, the \$768,292.00 payment due on December 28, 2019 from KEI under EPA #1. A true and correct copy of SAP's December 28, 2018 letter to KEI is attached hereto as Exhibit M and incorporated herein by reference.

KEI's Default Under the EPAs

24. The EP Supplement also describes events constituting events of default thereunder, which includes a failure to pay in full any payment under any of the EPAs within 30 calendar days of its due date.

25. The EP Supplement further provides that upon the occurrence of any event of default, SGEF is entitled to, among other things, declare all unpaid payments due under all EPAs (whether past due or scheduled to be paid), interest and other amounts then outstanding under the EPAs to be, immediately due and payable in full without presentment, demand protect or other notice of any kind.

26. Pursuant to the terms of the EP Supplement, KEI agreed to pay all legal and other fees and expenses incurred by SGEF with respect to its enforcement thereof.

COUNT I

BREACH OF CONTRACT

27. SGEF repeats and realleges each of the foregoing paragraphs as though fully set forth at length herein.

28. KEI breached the Order Form by having failed to remit a payment of \$819,292.00 due on December 28, 2018 under EPA #1.

29. SGEF has made due demand upon KEI for payment for the outstanding payment due under EPA #1, but despite such demand, KEI has failed and/or refused to honor its obligations. True and correct copies of SGEF's demand letters, through its counsel, are collectively attached hereto as Exhibit N and incorporated herein by reference.

30. By virtue of such failure, and pursuant to SGEF's cross-default rights and remedies under the EP Supplement, SGEF has declared that the \$768,292.00 payment due on December 28, 2019 under EPA #1 shall also be immediately due and payable by KEI.

31. Accordingly, as a direct and proximate result of KEI's breach of the Order Form, SGEF has been damaged in an amount of no less than \$1,587,584.00, plus accrued and accruing interest, late fees, costs, expenses, attorneys' fees, and any and all other amounts due thereunder.

COUNT II

BREACH OF CONTRACT

32. SGEF repeats and realleges each of the foregoing paragraphs as though fully set forth at length herein.

33. KEI breached the Order Form, as amended, by having failed to remit to SGEF payment of \$85,000.00 due on December 28, 2018 under EPA #2.

34. SGEF has made due demands upon KEI for payment for the outstanding payment due under EPA #2, but despite such demands, KEI has failed and/or refused to honor its obligations. See Exhibit J.

35. By virtue of such failure, and pursuant to SGEF's cross-default rights and remedies under the EP Supplement, SGEF has declared that the \$85,000.00 payment due on December 28, 2019 under EPA #2 shall also be immediately due and payable by KEI.

36. Accordingly, as a direct and proximate result of KEI's breach of the Order Form, as amended, SGEF has been damaged in an amount of no less than \$170,000.00, plus accrued and accruing interest, late fees, costs, expenses, attorneys' fees, and any and all other amounts due thereunder.

WHEREFORE, SGEF respectfully demands the following relief:

- (a) On Count I, judgment against KEI in the amount of no less than \$1,587,584.00, plus accrued and accruing interest, costs, expenses and attorneys' fees;
- (b) On Count II, judgment against KEI in the amount of no less than \$170,000.00, plus accrued and accruing interest, costs, expenses and attorneys' fees; and
- (c) Such other and further relief as this Court may deem just and proper.

Dated: October 9, 2019

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